COMPLETED 15
JUN 27 1986
501.72:1986-260
ORIGINAL
MF 184

T. C. Memo. 1986-260

UNITED STATES TAX COURT

BARNEY C. RUBEN AND ELEANOR RUBEN[1], Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 5788-82. Filed June 24, 1986.

John P. Callahan, for the petitioners.

Rosa Berman, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

CLAPP, Judge: Respondent determined deficiencies in petitioners' Federal income tax as follows:

1 Mrs. Ruben died February 15, 1985 prior to trial.

BEST COPY AVAILABLE

Year	Deficiency[2]
1976	$ 28,323
1977	48,140
1978	35,567

The issue for decision is whether petitioners' horse operations constituted an activity engaged in for profit.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Petitioners resided in California at the time they filed their petition in this case.

Petitioner-husband is a successful and busy real estate businessman. He built and sold homes and buildings for over 40 years. To conduct his real estate business, he formed the following corporations: Oxnard & Cedros Co., Inc.; Kesto, Inc.; 14830 Oxnard Street Inc.; Kester & Oxnard Co., Inc.; Kester Avenue Land Corp.; Ruben Homes, Inc.; Ruben Land Corp.; Ruben

---

2 In an amendment to answer, respondent alleged that the correct amounts of the deficiencies are $34,785.23, $54,976.14 and $40,282.06 for the years 1976, 1977 and 1978, respectively. The increased deficiencies are a result of respondent's shifting real property taxes associated with petitioners' ranch from Schedule A to Schedule F. Petitioner has conceded that the change is correct. Section 183(b) provides that deductions attributable to an activity not engaged in for profit are allowable in a certain order, starting with deductions otherwise allowable, e.g., taxes and interest. The remaining deductions, which would be allowable if they had been incurred in an activity engaged in for profit, are then allowed to the extent that gross income from the activities exceeds the deductions which were allowed first. Here, the real property taxes shifted from Schedule A to Schedule F are deducted first and result in increased deficiencies if petitioner's activities were not engaged in for profit.

BEST COPY AVAILABLE

Investment Co., Inc.; and Burvan Properties, Inc. In 1972, he formed an investment company from which he received a salary ranging from $73,500 in 1972 to $100,000 in 1978. Before taking into consideration the losses and property taxes of the ranch, petitioners' adjusted gross income for 1976, 1977 and 1978, the years at issue, was $370,326, $315,544 and $370,962, respectively.

In addition to petitioner-husband's real estate business, petitioners were involved in breeding, boarding and racing horses. Petitioners purchased their first horse in 1943.

Over the years, petitioners have owned four ranches: Van Nuys Ranch, El Bar Ranch, Running Springs Ranch at Newberry Park, California (Running Springs Ranch I) and Running Springs Ranch at Santa Yuez, California (Running Springs Ranch II).

Petitioners purchased the Van Nuys Ranch in 1943. It had 60 acres of land and a one-half mile track. Petitioners subdivided the ranch and built houses on it in 1947.

Petitioners purchased the El Bar Ranch in 1947. It had 40 acres of land and approximately 15 horses. Petitioner-husband did not like the location of the ranch because it was too far away from his real estate business. Petitioners sold the ranch in 1954.

Petitioners purchased Running Springs Ranch I in 1954. It had 272 acres and 11 horses. The value of the land appreciated because of an increase in the population in the area and its potential for residential and/or commercial development. The

BEST COPY AVAILABLE

value of the land did not appreciate because of its use as a horse ranch. Petitioners became dissatisfied with the location of the ranch and, in 1962, sold the ranch to a real estate developer for residential and/or commercial development. Petitioners reported a gain on the sale of the ranch on the installment method. Petitioners' capital gain, and interest income on a note from the sale, was reported as follows:

Year	Capital Gain	Interest	Total
1962	$ 570,363	$ 0	$ 570,363
1963	256,503	62,494	318,997
1964	256,503	98,494	354,997
1965	4,275	78,743	83,018
1966	207,156	60,572	267,728
1967	85,501	67,840	153,341
1968	85,501	60,840	146,341
1969	399,718	53,840	453,558
1970	257,905	40,044	297,949
TOTAL	$2,123,425	$522,867	$2,646,292

In 1962, petitioners purchased Running Springs Ranch II, a 1,000 acre ranch petitioner-husband still owns. It has a main residence, a pool, two detached guest bedrooms, a guest house, a manager's apartment, employee quarters, a 24 stall barn, 17 paddocks, a 4-stall broodmare barn, a 7/16 mile training track and 55 acres of pasture and grazing land.

Petitioners usually stayed at the ranch from Thursday night until Monday. While at the ranch, petitioner-husband spent most of his time gardening and petitioner-wife, who had taken genetics classes, maintained breeding records and filed foaling and breeding reports with various associations.

Petitioner-husband was president of the California Harness Horse Breeders Association from 1953 to 1955 and a member of the California Standardbred Sires Stakes Committee from 1976 to 1978. Both petitioners were active in horse industry associations.

Petitioners employed several people to assist them with the activities and record keeping of the ranch. They employed a maid who helped with the housekeeping and a ranch manager who had only an adequate reputation. Accountants maintained records of petitioners' personal, ranch and business affairs and prepared their tax returns from 1962 through 1982. Petitioner-husband did not review the tax returns prepared by his accountants but did keep some informal ranch records of his own. Petitioners did not prepare budgets for the ranch and used the same bank account for their personal and ranch expenditures.

As the owners of Running Springs Ranch II, petitioners were able to breed, board and race standardbred harness horses, activities which gave petitioners a great deal of pleasure. During 1976, 1977 and 1978, petitioners owned 30 brood mares and several stallions. During this same 3-year period, 48 mares were bred at the ranch. Petitioners raced 9 horses in 1976, 10 horses in 1977 and 7 horses in 1978. Breeding fees, boarding revenue, racing purses, other miscellaneous revenues, total expenses and net income for 1976, 1977 and 1978 were as follows:

BEST COPY AVAILABLE

	1976	1977	1978
Breeding fees	$ 719	$ 3,716	$ 3,238
Boarding revenues	12,585	31,031	26,149
Racing purses	48,711	86,479	87,080
Other revenues	32,253	7,733	13,135
Total expenses	(135,037)	(198,914)	(181,639)
Net Income	($40,769)	($69,955)	($52,037)

An itemization of the revenues and expenses associated with Running Springs Ranch II from 1962 to 1982 follows:

BEST COPY AVAILABLE

Line	Income:	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
1	Sales of Horse	$200	$1,500	$400	$1,000	$2,650	$11,625	$6,810	$12,770	$32,715	$36,000	$5,000
2	Pasture & Boar	9,218	10,397	7,272	4,717	3,621	3,068	6,722	13,969	19,216	23,584	36,475
3	Breeding Fees	465	718	0	861	310	400	405	1,799	3,529	818	1,788
4	Racing Purses	15,835	20,859	7,609	29,508	37,717	5,481	834	9,695	30,451	18,417	24,541
5	Leasing & Misc	5,000		238	3,932	1,465	421	275	2,029	3,456	1,162	780
6												
7	Total Income	$30,718	$32,674	$15,519	$40,018	$45,763	$20,995	$15,046	$40,262	$109,367	$79,981	$68,584
8												
9	Expenses:											
10	Advertising									325	344	
11	Bad Debts											
12	Blacksmith							930	406	1,116	2,312	2,855
13	Breeding Fees							5,150	820	200		2,229
14	Commissions									257		
15	Depreciation							21,884	22,092	21,232	21,500	23,079
16	Dues & Subs.							352	319	430	1,055	2,195
17	Feed							5,935	7,929	22,829	8,851	29,149
18	Gas and Oil							2,709	1,372	1,382	1,989	3,157
19	Insurance							4,423	3,338	2,472	2,351	2,000
20	Misc.							151	656	22		
21	Payroll Taxes							1,443	1,267	1,588	1,343	2,049
22	Repairs							8,493	5,151	5,285	4,782	9,353
23	Salaries							17,492	13,370	10,928	10,631	19,295
24	Seed & Fertilizer							791	522	581	747	
25	Stake Fees							40	150	483	450	150
26	Supplies							2,568	1,435	267	569	2,565
27	Taxes & Licenses							8,612	8,757	218	305	164
28	Telephone							1,546	813	213	332	
29	Training/Drivers							16,517	40,622	32,455	14,148	33,000
30	Travel							272	435			
31	Trucking							607	2,383	1,905	2,025	1,200
32	Utilities							3,666	1,867	877	1,268	1,111
33	Veterinary							1,753	2,043	3,884	3,969	7,308
34												
35	Total Expens	93,590	118,418	98,762	114,862	127,525	102,423	105,336	115,747	108,069	78,371	140,859
36												
37	Net Income	$-62,872	$-85,744	$-83,243	$-74,844	$-81,762	$-81,428	$-90,290	$-75,485	$1,298	$1,610	$-72,275
38												

BEST COPY AVAILABLE

Line	Income:	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
1	Sales of Horse	$10,310	$10,849	$12,421	$32,253	$6,471	$13,135	$17,000	$12,570	$58,985	$34,329
2	Pasture & Boar	29,404	38,028	32,957	12,585	31,031	26,149	25,040	90,344	72,552	111,472
3	Breeding Fees	925	2,720	1,175	719	3,716	3,238	3,442	910	1,415	4,353
4	Racing Purses	11,683	25,321	48,437	48,711	86,479	87,080	28,914	18,157	27,126	68,861
5	Leasing & Misc	517	212			1,262			500		
6											
7	Total Income	$52,839	$77,130	$94,990	$94,268	$128,959	$129,602	$75,196	$122,481	$159,998	$219,015
8											
9	Expenses:										
10	Advertising										
11	Bad Debts	1,600									
12	Blacksmith	994	818	999	51		500	2,399	1,896	382	708
13	Breeding Fees	1,239	1,229			3,646	4,274	250			
14	Commissions							3,600	6,191	9,802	4,474
15	Depreciation	23,381	21,757	21,178	18,441	17,710	16,578	15,341	14,462	18,022	11,436
16	Dues & Subs.	2,803	986	752	597	469	884	1,197	478	63	1,327
17	Feed	5,648	6,371	11,763	8,643	2,316	11,029	7,038	20,051	18,720	34,368
18	Gas and Oil	2,618	3,515	2,557	2,267	2,221	66	56			25
19	Insurance	2,364	1,716	2,041	2,234	2,292	2,571	4,666	5,017	2,971	3,016
20	Misc.			273	246	35	329	2,914	1,535		114
21	Payroll Taxes	1,321	1,335	1,290	1,116	1,280	1,162				
22	Repairs	5,911	4,620	3,135	4,532	2,306	2,384	1,798	2,505	3,846	4,286
23	Salaries	16,028	17,190	15,303	12,035	13,895	14,624	28,064	32,377	34,737	32,957
24	Seed & Fertilizer				370	350	401				
25	Stake Fees		2,740	2,700	900	2,745	100	1,620	2,865	4,625	7,575
26	Supplies	75		2,125	3,451	9,431		1,926	1,175	1,422	266
27	Taxes & Licens	1,273	1,388	3,363	2,176	1,134	2,098	3,186	2,848	3,296	3,274
28	Telephone				98	139					
29	Training/Drive	25,861	41,425	52,747	65,017	114,197	102,035	47,524	18,040	33,705	65,388
30	Travel										
31	Trucking	3,160	4,920	881	6,381	15,010	11,747	22,487	1,352	10,296	5,840
32	Utilities	1,153	1,366	1,450	1,649	2,073	1,578	1,574	1,858	826	1,036
33	Veterinary	4,283	3,404	2,279	4,833	7,665	9,279	4,574	1,127	2,826	1,145
34											
35	Total Expense	$99,712	$114,692	$124,836	$135,037	$198,914	$181,639	$149,306	$114,577	$145,539	$177,235
36											
37	Net Income	$-46,873	$-37,562	$-29,846	$-40,769	$-69,955	$-52,037	$-74,110	$7,904	$14,459	$41,780
38											

BEST COPY AVAILABLE

4

As reflected in the charts, Running Springs Ranch II was not profitable. It suffered a substantial loss in each year during the 18-year period 1962-1979. In 1970 and 1971, and through 1982, petitioners' accountants improperly reported real property taxes. If the real property taxes had been properly reported, the net income of Springs Ranch II for 1970[3] and 1971 would have been ($7,202) and ($7,060), respectively. From 1962 to 1979, Running Springs Ranch suffered total losses of over $1,000,000.

The examination of petitioners' returns for the years at issue began in 1979. In 1980, Running Springs Ranch II began to show a profit. The profit was a result of a lease agreement between petitioners and the Southern California Racing Association (SCRA), the President of which was a long-time friend and business associate. Under the agreement, petitioners leased to SCRA 65 acres of pasture and other various facilities. No horses were ever boarded at the ranch pursuant to the agreement. SCRA paid petitioners $36,000 in 1980 and $40,000 in each of the years 1981, 1982 and 1983. In 1984, SCRA sold its only asset and dissolved. The purchaser of SCRA's asset was the successor in interest to the lease between petitioners and SCRA. The purchaser decided it did not need the boarding facilities at Runnings Springs Ranch II and cancelled the lease in 1984.

---

3 For any taxable year beginning after December 31, 1969, a presumption that horse related activities are engaged in for profit applies if the activities are profitable in two out of seven consecutive years. Sections 183(d) and (e)(1).

BEST COPY AVAILABLE

ULTIMATE FINDING OF FACT

Petitioners' horse operations did not constitute an activity engaged in for profit during the years 1976, 1977 and 1978.

OPINION

Section 183(a) provides generally, if an activity is not engaged in for profit, no deduction attributable to such activity shall be allowed except as otherwise provided for in that section. Section 183(c) defines "activity not engaged in for profit" as "any activity other than one with respect to which deductions are allowable * * * under section 162 or * * * paragraph (1) or (2) of section 212." Section 1.183-2(b), Income Tax Regs., provides a list of nine factors to consider in the determination of whether an activity is engaged in for profit.[4] However, the resolution of the issue is to be based on all the facts and circumstances. Engdahl v. Commissioner, 72 T.C. 659, 666 (1979). In order for the taxpayer to prevail, the facts and circumstances must indicate that the taxpayer entered into, or

---

[4] The factors are:

(1) The manner in which the taxpayer carried on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that the assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or loss with respect to the activity; (7) the amount of occasional profit, if any, which is earned; (8) the financial status of the taxpayer; and (9) whether elements of personal pleasure or recreation are involved.

BEST COPY AVAILABLE

continued, the activity with an actual and honest objective of making a profit. Dreicer v. Commissioner, 78 T.C. 642, 645 (1982), affd. without opinion 702 F.2d 1205 (D.C. Cir. 1983).

In the present case, the evidence does not support a finding that petitioners' activities were engaged in for profit. First, petitioners did not carry on the activity in a businesslike manner. Although petitioner-husband kept some informal records or notes and petitioner-wife kept breeding records, nothing in the record suggests that petitioners had anything but a vague understanding of the finances of the ranch. Petitioners did not prepare a budget for the ranch. They advertised in only two years; in 1970 they spent $325 on advertising and in 1971 they spent $344. Petitioners did not maintain a separate bank account for the ranch.

Secondly, petitioners did not devote a significant amount of time to the activities of the ranch. Although they each kept some records, they usually spent only weekends at the ranch, and even then, petitioner-husband devoted most of his energies to gardening. Lack of time devoted to an activity is not necessarily indicative of a lack of profit motive where other competent and qualified people carry on the activity. Section 1.183-2(b)(3), Income Tax Regs. In the present case, however, petitioners' ranch manager had only an adequate reputation and we were not informed as to the reputation of petitioners' other employees.

BEST COPY AVAILABLE

Finally, Running Springs Ranch II suffered a loss in each year during the 18-year period 1962-1979. During this period, the losses totalled over $1,000,000. During 1976, 1977 and 1978, the years at issue, Running Springs Ranch II had a net income (loss) of ($40,769), ($69,955) and ($52,037), respectively. The only apparent rewards petitioners received from the ranch were the tax benefits associated with the losses and the personal pleasure derived from the activities of the ranch.

Petitioners argue that because they reported the capital gain and interest income from the sale of Running Springs Ranch I on the installment method, their ranching operations actually were profitable from 1962 through 1970. We disagree. When land/a ranch appreciates independently of the horse related activities, the gain on the sale of the land is not taken into account when evaluating petitioner's profits and losses from their ranching operations.[5] In the present case, the appreciation of Running Springs Ranch I was attributable to its potential residential and/or commerical development, not to its use as a horse ranch. Thus, the capital gain and interest income from the sale of Running Springs Ranch I should not be taken into account when evaluating petitioner's profits and losses from their ranching operations. Cf. section 1.183-1(d)(1), Income Tax Regs.

---

5 LaMusga v. Commissioner, T.C. Memo. 1982-742. Cf. Engdahl v. Commissioner, 72 T.C. 659, 668 (1979) (appreciation in value of ranch based on its use as a horse ranch).

BEST COPY AVAILABLE

Petitioners also argue on brief that their ranch was profitable from 1980 through 1982.[6] Respondent contends that the profits in those years are a result of a bogus lease between petitioner and SCRA. We need not decide whether petitioners took steps in 1980 to make Runnings Springs Ranch II profitable or whether the lease was in fact a sham. The years at issue are 1976, 1977 and 1978. During these years, the ranch was unprofitable and petitioners were not engaged in an activity for profit.

Decision will be entered under Rule 155.

---

[6] At trial, petitioners contended that these years were irrelevant because they dealt with years subsequent to the years at issue.

BEST COPY AVAILABLE

COMPLETED
JUL 2 1986

JUL 11.7/2 : 1986-261

ORIGINAL

189

T. C. Memo. 1986-261

UNITED STATES TAX COURT

LARS A. GARRISON AND GAYLE GARRISON, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 21594-84. Filed June 25, 1986.

Alan L. Schiff, for the petitioners.

Robert J. Percy, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

CLAPP, Judge: Respondent determined a deficiency in income tax in the amount of $137,099 for the calendar year 1980. The only issue for decision is the value of certain real estate in the Village of Scarsdale, which petitioners donated to the village.

BEST COPY AVAILABLE

For convenience, our findings of fact and opinion are combined. Some of the facts have been stipulated and are found accordingly. The stipulation of facts and attached exhibits are incorporated herein by this reference. Petitioners were residents of Connecticut at the time they filed their petition.

Petitioners owned two contiguous parcels of land bordering on the Hutchinson River in the Village of Scarsdale. These parcels will be referred to hereinafter as the "Village Property" and the "Netter Property."

The Village Property was acquired by petitioners at an auction sale held by the Village of Scarsdale on November 18, 1975. Only abutting property owners or those with legal access to the property were eligible to bid. Petitioners were the highest bidders and paid $6,500 for the Village Property. The next highest bid was $6,000 and an abutting neighbor, Carmine Labriola, bid $2,200. The deed from the Village to petitioners contained certain restrictions as follows:

> "No building may be constructed which may be usable for human habitation, nor may any tennis courts, or swimming pools be constructed, nor may any fence be constructed on the premises."

Petitioners acquired the Netter Property in 1977 from the executors of the Estate of Robert and Francis Netter upon the payment to the estate of $1,000 plus the payment of back taxes due on the property in the amount of $3,686.31 for a total of $4,686.31. There were no restrictions in the deed for the Netter Property.

BEST COPY AVAILABLE

The Netter estate originally offered the property to petitioners in 1976 for $5,000 plus the payment of delinquent taxes. In 1964, the estate had offered the property to the Village for $5,000. The area in question was zoned to permit residential lots, with 50 by 100 feet being the minimum lot size permitted. The property has been zoned for residential development since approximately 1888.

The Village and Netter Properties, adjacent to the Hutchinson River, are low and swampy. Most of the subject property is within a wetland area and a flood plain, therefore, development is subject to approval from various local, state and federal agencies. A portion of the Netter property is within a floodway where development is absolutely prohibited.

In 1979, petitioner attempted to make a gift of both properties to the Village of Scarsdale. This gift was rejected by the trustees of the village, because the village was attempting to get rid of, rather than acquire, various small parcels of land around the village which resulted in maintenance problems and complaints from the citizens about dumping and other illegal and improper uses of the properties.

This rejection of petitioners' offer of a gift resulted in a public outcry led by the Scarsdale Audubon Society, the League of Women Voters and other groups who viewed this property as a natural preserve which should be acquired and kept in its natural state by the village. Yielding to this constituent pressure, the trustees in 1980 voted to accept the Village and Netter

BEST COPY AVAILABLE

properties from petitioners with the understanding that a fund would be set up to maintain the property. Petitioners contributed $5,000 to that fund. The deed from petitioners to the Village of Scarsdale contained the "express condition that the property shall be maintained in its natural state, free of all buildings and structures, with the right of reasonable public access thereto, and subject to the natural and uninterrupted flow of the brook crossing the premises."

Petitioners on their income tax return for the year 1980, took a deduction for $290,750 for the value of the land contributed and a deduction for $5,000 for the gift to the maintenance fund. Respondent allowed the $5,000 cash gift to the maintenance fund but determined that the property was worth only $17,000 and allowed only that amount as a deduction. Petitioner on brief lowered their claimed deduction to $231,030.

Petitioners called as witnesses a real estate appraiser, an engineer, and a developer for the purpose of substantiating their values. The real estate appraiser, Mr. Marx, originally valued the two properties at $511,500 based upon a plan which subdivided the properties into thirteen lots. Subtracting the engineering costs of $220,750 to bring the properties to grade, the value reached was $290,750, the amount petitioners claimed on their return. Mr. Marx subsequently revised his appraisal by excluding the Village Property from the subdivision because of the deed restriction imposed by the village. In the revised appraisal the Netter Property was subdivided into six lots with the Village

BEST COPY AVAILABLE

Property providing incremental value to the abutting property owners. He assumed that the requirements of various governmental regulations would be met and that approvals would be received without too much difficulty from the zoning board, the planning board, and several environmental agencies. Following the approvals, the property could be brought to grade. Based upon the selling price for building lots in the area which were scarce since the area had been already well developed, he came to a total value for this property of $333,030 subject to the engineering costs.

Petitioners' engineer, Mr. McCurdy, testified that the Netter Property could be brought to grade and otherwise dealt with from an engineering point of view to make the lots buildable. His testimony with respect to the environmental impact and the possibility of receiving the necessary approvals from the environmental agencies was rather vague and indefinite and at one point in his testimony, he denied having any environmental expertise. Mr. McCurdy concluded that development costs would run to $102,000 for the Netter Property, which included road construction, grading, and engineering. It is not clear whether he took into account any of the other costs of development such as sales commissions, filing fees, planting, and the like.

BEST COPY AVAILABLE

Finally, a real estate builder and developer, Mr. Silverstein, who had had many years of experience in developing residential property in the area, testified that development was possible and would be economically feasible. However, his conclusion was based upon the assumption that he was working with building lots which had received all of the necessary approvals.

Respondent's expert, Mr. Jefferies, took the view that these properties were basically wetland and flood plain properties which could not be developed. His secondary position was that even if all necessary approvals could be obtained, development was not economically feasible, since the cost of filling and bringing the land to grade, putting in streets, and otherwise making building lots out of this low, swampy area would be prohibitive. Mr. Jefferies' basic position was supported by other witnesses.

Mr. Newman, the Deputy Village Manager, testified that the property falls into the wetlands and flood plain area which would require applications to local and state environmental agencies and approvals before any development could be accomplished. He did not presume to speak for those agencies and predict what their decision would be, however, he testified that he personally would not recommend approvals for development. He also testified that he would expect substantial objections from neighbors and other citizens' groups if applications were made. Although these complaints had no binding effect and might be ignored by the

BEST COPY AVAILABLE

various boards involved, they would have to be taken into account as a practical matter, as they were in 1979 and 1980 when the board of Trustees initially attempted to turn down petitioners' gift of the property.

Mr. Labriola, a retired landscape gardener and neighbor who has lived on property abutting the Village Properties since 1949, also testified. He attempted to buy the Village Property in 1976 at the time it was acquired by petitioners. He wanted to buy the property in order to have control of it and join with his neighbors in cleaning it up and eliminating the use of the property as a dumping ground for leaves and other trash. He bid $2,200 for the Village Property as that is all that he was willing to pay for the property for his purposes. Having lived next to the property for over 30 years, he had concluded from his own experience and after discussion with the town engineers that it was too wet and swampy for building and did not consider the Village Property, or for that matter the Netter Property, as being suitable for development.

Upon review of the entire record, we agree with respondent's position. These properties have been zoned for residential development since 1888. The Netter property was offered for sale in 1964 and again in 1976 for $5,000. The Village property was offered at public auction in 1975, and although there were only eleven abutting owners who were eligible to bid, in fact only three bid and $6,500 bought the property. The Village of Scarsdale is approximately 100 years old and there are very few

BEST COPY AVAILABLE

empty building lots left in the village. Throughout this entire time, the subject property has never been built upon or developed. It seems logical to conclude that if the Village and the Netter Properties had been suitable for development, this would have happened some time ago.

After careful consideration of all of the expert witness reports and testimony with respect to the valuation of this property, it is our conclusion that petitioners have been far too aggressive in their claimed value of this property and in seeking to profit from their "good works" at the expense of Uncle Sam. The position of respondent is more logical and reasonable and accordingly, we find that the value of the Netter and Village Properties was $17,000.

Decision will be entered for respondent.

BEST COPY AVAILABLE

COMPLETED

Ju 11.7/2:1986-262

ORIGINAL

T. C. Memo. 1986-262

UNITED STATES TAX COURT

THOMAS M. FARRELL AND JO ANN FARRELL, Petitioners
v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 35307-83, 23084-84.

Filed June 26, 1986.

R. Bertil Peterson and George Lynch (specially recognized), for the petitioners.

Frank Laurino, for the respondent.

MEMORANDUM OPINION

PARR, Judge: Respondent determined deficiencies and additions to tax in petitioners' 1980 and 1981 Federal income tax liabilities as follows:

BEST COPY AVAILABLE

Year	Deficiency	Additions to Tax, I.R.C. 1954 Sec. 6653(a)[1]	Sec. 6653(a)(1)	Sec. 6653(a)(2)
1980	$5,271.00	$263.55	-	-
1981	9,076.00	-	$454.00	50% of the interest due on $9,076.00

On February 10, 1986, we granted respondent's motion to dismiss for failure to properly prosecute, pursuant to Rule 123(b).[2] At that time, we took under advisement respondent's motion for damages under section 6673. After examining the entire record, we feel that the imposition of damages is warranted here.

At the time of filing the petitions in these consolidated cases, petitioners resided in Brooklyn, N.Y.

On their tax returns for 1980 and 1981, petitioners claimed charitable contributions to the Universal Life Church ("ULC") in the amounts of $15,410.00 and $25,495.00, respectively. In his notices of deficiency, respondent disallowed these claimed deductions. In addition, respondent disallowed a portion of petitioners' miscellaneous, job-related deductions claimed in 1980. Respondent also determined additions to tax for negligence as to both tax years. After receiving each notice of deficiency, petitioners filed a petition in this Court for a redetermination

---

1 All section references are to the Internal Revenue Code of 1954, as amended.

2 All Rule references are to the Tax Court Rules of Practice and Procedure.

BEST COPY AVAILABLE

of the deficiencies and additions to tax. The petitions were on pre-printed, fill-in-the-blank forms apparently provided by the ULC. The petition for 1980 disputed only the disallowed charitable contributions. Attached to both petitions were copies of pre-printed ULC contribution receipts apparently intended to substantiate petitioners' claimed contributions deductions.

Upon motion by respondent, the cases were consolidated for trial, briefing, and opinion on January 2, 1986. Both cases were set for trial at the trial session of this Court in New York, N.Y., to commence on January 13, 1986.

Prior to trial, two subpoenas duces tecum, dated January 8, 1986 were issued, commanding each petitioner to appear at the Court's January 13, 1986 trial session, and to bring various documents and records relating to their claimed contributions to the Universal Life Church. The documents and records requested included correspondence with the ULC; their own ULC chapter's charter; lists of its officers and directors; records of all meetings held by their ULC chapter; all checking and savings account records in their own or their ULC chapter's name; and copies of all checks and other records which would substantiate their charitable contributions during the years at issue.

Prior to service of the subpoenas, on the afternoon of January 10, 1986, respondent's counsel Mr. Laurino met with Mr. Lynch, petitioners' representative. Mr. Laurino showed Mr. Lynch a copy of the subpoena, reviewed it with him, and gave him a courtesy copy. A short time later that day, petitioner Thomas

BEST COPY AVAILABLE

Farrell, knowing the subpoenas were coming, shipped various documents to ULC headquarters in Modesto, California. At about 6:00 p.m. that evening, petitioners were served with their subpoenas.

When the case was called for trial on January 14, 1986, Mr. Lynch and his partner, Mr. Peterson, appeared on behalf of petitioners. Mr. Peterson is admitted to practice before this Court and had entered an appearance in the case. Mr. Lynch is not admitted to practice in the Tax Court. Respondent informed the Court that petitioners had failed to comply with the subpoenas duces tecum, in that they had failed to provide all of the requested documents. Respondent made an oral motion to dismiss the case for failure to properly prosecute, and to award section 6673 damages.

When questioned about his failure to comply with his subpoena, Mr. Farrell testified that he had mailed away certain "church" checking account records to ULC headquarters at the latter's request, about two hours before he was served with the subpoena. He said that while he knew he would be served with a subpoena, he did not know which records would be requested. He further stated that the records would be returned to him upon his request.

In response to questioning by the Court, Mr. Lynch confirmed having received a copy of the subpoena to be served on his clients, but said he had no knowledge of the records being mailed to California that afternoon; rather, he thought the records had

BEST COPY AVAILABLE

been sent to California at another time in the normal course of business. Mr. Peterson assured the Court that the documents could be retrieved from ULC headquarters upon request, and that he would subpoena them if necessary. He therefore asked for a continuance in order to obtain the records. We agreed to continue the case to the next trial session, beginning February 10, 1986. We advised petitioners:

> I want to make another thing clear, that I'm not pleased with the way the petitioners have behaved in this case. I think there are some games being played here and the Court is not amused. * * * I want it made very clear that I expect full compliance or this case will be dismissed.

On January 29, 1986, the Court, Mr. Lynch and Mr. Laurino took part in a conference call. The Court asked Mr. Lynch whether the documents had been turned over. They had not. The Court directed Mr. Lynch not to wait for the ULC to voluntarily return the documents. Mr. Lynch stated that petitioners' subpoena on the ULC would be served the next day (January 30, 1986). The Court reminded Mr. Lynch that the subpoenas had to be complied with by February 10, 1986.

Also, on January 29, 1986, the Court set a date certain of February 21, 1986 for trial of this case, for the convenience of Mr. Peterson. A few days later, Mr. Lynch telephoned the Court to inquire whether he had to be present at calendar call on February 10, since a date certain had been set for February 21. Mr. Lynch was informed that he did have to be present unless the documents subpoenaed by respondent had been turned over.

BEST COPY AVAILABLE

Another conference call was held on February 5, 1986, between the Court, respondent and Mr. Peterson. The Court again asked Mr. Peterson whether he had served his promised subpoena on the ULC. Mr. Peterson replied that he had "requested" documents and ULC had not yet refused to return them. No subpoena had been served. Mr. Peterson said he intended to use a return date of February 21. The Court told him the documents had to be in respondent's hands by February 10. Mr. Peterson informed the Court that he could not be present at calendar call on February 10, 1986 because of another commitment. The Court agreed to specially recognize Mr. Lynch, who is not otherwise admitted to practice before this Court, to represent petitioners at the February 10, 1986 calendar call. Again, we reminded petitioners that the case would be dismissed if the documents were not produced.

At calendar call on February 10, 1986, the Court inquired whether petitioners had complied with the subpoenas. They had not. Respondent renewed his motion, in writing, for dismissal of the case and for damages. At a hearing on the motion later that same day, petitioners stated that after numerous attempts to contact ULC in order to retrieve the documents, by telephone and by letter, they had served a subpoena on the ULC, but had not yet received the documents. Petitioners then claimed that based on the January 29, 1986 conference call with the Court and respondent, they had expected the motion to be heard on February 21, 1986, and requested the 11 extra days to produce the

BEST COPY AVAILABLE

documents. The Court replied that it was clear to all parties involved that the subpoenas had to be complied with by calendar call. The Court further noted that any subpoena served by petitioners on ULC was not until after the February 5, 1986 conference call. We stated that we believed petitioners had not acted in good faith, and we dismissed the case for failure to properly prosecute. We took under advisement respondent's motion for damages at that time.

Pursuant to section 6673, this Court is authorized to award damages not in excess of $5,000 whenever it appears to us that the proceeding has been instituted or maintained primarily for delay, or that a taxpayer's position is frivolous or groundless. Our review of the facts of this case leads us to the conclusion that petitioners did indeed institute and maintain these proceedings primarily for delay, and that their position was frivolous or groundless.

To begin with, not one legitimate issue was raised in either petition filed in this case.[3] Petitioners disputed respondent's disallowance of their claimed contributions to the Universal Life Church. This Court has repeatedly held that such amounts do not qualify as charitable contributions, and has sustained the addition to tax for negligence in such cases. See, e.g., Bell v. Commissioner, 85 T.C. 436 (1985); Davis v. Commissioner, 81 T.C.

---

3 The notice of deficiency relating to 1980 raised another, seemingly legitimate, issue regarding business expenses; however, that issue was not disputed in the petition.

BEST COPY AVAILABLE

806 (1983), affd. by unpublished opinion 767 F.2d 931 (9th Cir. 1985).[4] We find petitioners' position to be against long-standing Tax Court authority, and to be without merit. As such, damages under section 6673 are appropriate. Bell v. Commissioner, supra.

We further find that petitioners instituted and maintained these proceedings primarily for purposes of delay. It is obvious to us that petitioners had no intention of producing the documents called for in the subpoenas, and that their repeated assurances to the Court were not in good faith. We find incredible Mr. Farrell's testimony that he did not know which documents would be requested in the subpoenas at the time he mailed the records to California. We also find unconvincing Mr. Lynch's statements that he did not know that the documents were mailed following his meeting with respondent and before service of the subpoenas. Lastly, the fact that petitioners did not retrieve the documents after repeated assurances that they would do so, and after being granted four additional weeks for this purpose, makes clear that their intentions were never to produce the records.

---

[4] We also note that we have repeatedly rejected petitioners' pre-printed "contribution receipts" as admissible evidence in these cases. Bell v. Commissioner, 85 T.C. 436 (1985); Davis v. Commissioner, 81 T.C. 806 (1983), affd. by unpublished opinion 767 F.2d 931 (9th Cir. 1985); Kalgaard v. Commissioner, T.C. Memo. 1984-283, affd. 764 F.2d 1322 (9th Cir. 1985).

BEST COPY AVAILABLE

Petitioners' conduct in regard to the subpoenas justified our dismissal of this case. It also evidenced a disrespect for this Court, and showed that they had no desire for a resolution of this case through a trial on the merits. In other cases in which taxpayers have tampered with or refused to produce requested documents, we have seen fit to impose damages. See Keating v. Commissioner, T.C. Memo. 1985-312; Coulter v. Commissioner, 82 T.C. 580 (1984); Babcock v. Commissioner, T.C. Memo. 1981-90; Wilkinson v. Commissioner, 71 T.C. 633 (1979).

As the facts outlined above indicate, the Court has gone out of its way to accommodate petitioners. After deliberately tampering with subpoenaed documents, petitioners were granted a four-week continuance in order to comply with their subpoenas. Petitioners' counsel, Mr. Lynch, was specially recognized by the Court when Mr. Peterson could not appear at calendar call. A date certain for trial was set well in advance of the trial session in order to accommodate Mr. Peterson's schedule. Lastly, in numerous phone calls, the Court took time to repeatedly remind petitioners' counsel of their obligations. In return, petitioners have merely wasted the time and effort of this Court and of respondent.

As we stated in Wilkinson v. Commissioner, supra, we find that petitioners' entire course of conduct indicates that they instituted and maintained these proceedings primarily for

BEST COPY AVAILABLE

purposes of delay. We therefore award damages to the United States in the amount of $3,000 in docket No. 35307-83 and $5,000 in docket No. 23084-84.

An appropriate order and decision will be entered.

BEST COPY AVAILABLE